

Protecting Traditional Cultural Properties Through the Section 106 Process

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Section 106 of the National Historic Preservation Act requires federal agencies to “take into account the effects” of their undertakings—which may include licensing, funding, or permitting of activities carried out by private parties as well as activities actually performed by agency personnel—on historic properties. Historic properties are defined as sites, districts, structures, or objects that are on or eligible for inclusion in the National Register of Historic Places.

To be eligible for the National Register, a property must be at least 50 years old; must possess integrity of location, materials, and workmanship; and must meet one or more of the following criteria:

- a. it is associated with events that have made a contribution to the broad pattern of our history;
- b. it is associated with the life of a person significant in our past;
- c. it embodies a type or period or method of construction; it represents the work of a master or has high artistic values; it is a part of a larger, significant historic property; or
- d. it has yielded or has the potential to yield important information about history or prehistory.

The process by which federal agencies meet this responsibility to take into account the effects of their undertakings on historic properties involves four steps:

- **Identification** of any potential historic properties in the area of effect for the undertaking;
- **Evaluation** of any properties identified to determine whether those properties are eligible for the National Register;
- **Assessment** of the effects of the undertaking on any eligible properties; and, if there will be an effect on those qualities that make a historic property eligible for the Register,
- **Treatment** or mitigation of the effect.

The federal agency carries out this process in consultation with the federal Advisory Council on Historic Preservation and the State Historic Preservation Officer in the affected state and with input from interested parties of many sorts.

Until about two years ago, most of the historic properties being identified in the Section 106 process were buildings of various sorts and archeological sites. They were properties identified through pedestrian survey by architectural historians or archeologists and documented through on-the-ground recording and archival research.

With the publication in 1990 of National Register Bulletin 38, “Guidelines for Evaluating and Documenting Traditional Cultural Properties,” however, federal agencies became aware that there was another class of historic properties that they needed to identify within the Section 106 process: traditional cultural properties.

What is a Traditional Cultural Property?

Bulletin 38 defines traditional cultural properties as historic properties whose significance derives from “the role that the property plays in a community’s historically rooted beliefs, customs, and practices.” The bulletin goes on to say that traditional cultural properties are eligible for the National Register because of their “association with cultural practices or beliefs of a living community that (a) are rooted in that community’s history, and (b) are important in maintaining the continuing cultural identity of the community.”

Traditional cultural properties are historic properties, and as such, they are subject to exactly the same Section 106 process as other historic properties. There are differences between traditional cultural properties and other kinds of historic properties in exactly how the steps in the Section 106 process are carried out, just as there are differences in how we handle prehistoric sites vs historic architecture, but the process is the same. The unique aspects of identifying and evaluating traditional cultural properties have to do with tapping into the specialized knowledge and information that is maintained within the traditional community.

Although many traditional cultural properties have physical manifestations that anyone walking across the surface of the earth can see, others do not have this kind of visibility, and more important, the meaning, the historical importance of most traditional cultural properties can only be evaluated in terms of the oral history of the community. To **identify** some traditional cultural properties and to **evaluate** all traditional cultural properties requires that agencies obtain the services of knowledgeable individuals in the traditional communities whose traditional use areas will be affected by an undertaking.

Likewise, in evaluating the **effect** of an undertaking on a traditional cultural property and in determining appropriate **mitigation** for any adverse effects, the input of the traditional community is essential. The question of effect still has to do with effects to those qualities of a site that make it eligible for the National Register, and mitigation still has to do with lessening effects to those qualities. Because the historical significance of traditional cultural properties is rooted in the cultural practices of the community, however, and because these properties are important in maintaining cultural continuity, we have to be certain that we are not “preserving” the property or mitigating effects to it in such a way that we destroy the property’s ability to function appropriately in the context of the community and its cultural traditions.

Misconceptions

These methodological differences in how traditional cultural properties are handled vs how prehistoric and historic architectural sites are handled, coupled with the general unfamiliarity of most federal agency managers and most public land users with traditional communities, has

led to a number of misconceptions and unfounded fears about traditional cultural properties and about their incorporation into the Section 106 process.

The first of these is what I call the “Gertrude Stein” complaint. Ms. Stein, you will recall, is the lady who said of Oakland, CA, that there was no “there” there. I frequently hear the same assessment of traditional cultural properties. It is true that some traditional cultural properties have no material manifestations. Some are readily visible landforms or landscape features, such as buttes or springs or mountains, that are associated with an event or person but exhibit no human modification or associated artifacts. Others are less clearly delimited “empty” spaces and could not be identified without the specialized knowledge maintained in the community.

The misconceptions here are that **all** traditional cultural properties are of this type and that **only** traditional cultural properties have these characteristics. I’d like to deal with the second misconception first. Consider Walden Pond, the Treaty Oak, Donner Pass, Plymouth Rock—all landforms and landscape features that have very specific but not empirically obvious historic associations. And consider Civil and Revolutionary War battlefields, the route of the Lewis and Clark Expedition, the Chisholm Trail, and the Trinity Test Site where the first atom bomb was exploded; all are “empty” landscapes with excellent historic credentials. None of these sites could be identified and evaluated were it not for the availability of historical records, yet no one would deny their historic importance. To doubt the historic importance of traditional cultural properties because “you can’t see them” and because they can be identified and evaluated only through oral history is to claim that people who don’t have written history don’t have history.

Misconception number 2, that **all** traditional cultural properties are physically unmodified by human activities, is equally untrue. Traditional cultural properties often have artifactual and architectural manifestations. Native American shrines, for example, may have both; rock art panels, trail markers, ruined and dismantled structures, and many other material manifestations may mark the location of Native American traditional cultural properties. Archeological sites may be identified as ancestral sites of living tribes through specific oral traditions about the site or through artifactual evidence.

Traditional cultural properties of concern to non-Native American traditional communities may also be material or “immaterial” in the sense discussed above. In one New Mexico case, an electrical substation was built on a seemingly “empty” piece of ground, but in fact, this was the location where a Hispanic community traditionally held the costumed dance known as “Los Matachines.” Other Hispanic traditional cultural properties might include the remnants of traditional land-use patterns—long-field systems, community ditches—or the shrines, descansos, roadside crosses, moradas, and other properties associated with folk religious traditions and practices that are central to the unique culture of Hispanic New Mexico.

A third misconception that often arises with Native American traditional cultural properties is that they are religious or sacred sites, not historic sites, and that they should be handled under the American Indian Religious Freedom Act, not the National Historic Preservation Act. The misconception here results from a failure to under-

stand that in many cultures there is no separation or distinction between sacred and secular; what we would call the sacred permeates and informs all of life. In such cultures, most places, events, and things have “sacred” associations or connotations as well as “secular” functions and meanings in our terms. The idiom of explanation in Native American societies often focuses on these “sacred” associations rather than on what we would call material or secular aspects of the situation. But this discussion of the importance of a place in what we would call “religious” terms does not obviate the historical importance of that place.

In some ways, I agree that it would be better if we could handle protection of Native American traditional cultural properties under AIRFA rather than under NHPA. Some of the requirements for protecting these properties are difficult to meet in the Section 106 process, and the Section 106 process is, in many ways, badly suited to meeting the preservation needs of these properties. The emphasis on historic qualities and on criteria of eligibility focused on historic importance requires that tribes make a distinction that they find very artificial and excludes some types of very important sites from consideration and protection under NHPA. The need to establish mappable boundaries for historic properties, the extremely sensitive and confidential nature of the information about some traditional cultural properties, and the lack of actual protection (as opposed to consideration) inherent in the Section 106 process make this process a poor fit with the preservation needs of Native American traditional communities.

Having said this, however, I need to point out that for all that this process sometimes does violence to the traditional properties and for all that these properties do not fit very well with the process, it is the only process that we have right now for offering some level of protection to traditional cultural properties located off tribal lands. And with flexibility and cooperation and understanding on both sides, we can make it work. Having dealt summarily with the misconceptions, I would like to devote the rest of this paper to sharing with you some techniques that we are using to make the Section 106 process work for traditional cultural properties in New Mexico.

Identification

In order for a federal agency to take into account the effects of an undertaking on historic properties, it must first know what properties are within the area to be affected. As noted above, many properties of concern to traditional communities cannot be identified through pedestrian surveys and archival research, but must be identified through interviews with knowledgeable individuals within the community.

For federal agencies, this raises the issues of when to ask, who to ask, and how to ask. The latter two questions will be addressed by far more qualified folks in subsequent papers in this issue; here I would like to address the issue of when to ask. One problem that arises is in defining “traditional communities.” With Native Americans, there are federal criteria for recognition of tribes and other groups, but in some parts of the country most Native Americans do not belong to federally recognized tribes, and some mechanism must be found to include them in the traditional cultural property identification process.

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For non-Native American traditional communities, this issue can also be somewhat complicated. In New Mexico, some Hispanic traditional communities are coterminous with recognized legal entities such as villages or land grants; others are simply informally recognized neighborhoods or rural settlements; still others are largely nonresidential. For the purposes of knowing when to ask about traditional cultural properties, we have defined traditional communities as those that depend heavily on oral transmission of their history and traditions, those whose unique historical practices depend on continued access to and use of places whose history cannot be discovered in written records.

Another “when to ask” issue is a critical one in a state such as New Mexico where federal agencies carry out or fund or license or permit thousands of undertakings every year. Native American groups now living in New Mexico and in bordering states have identified immense and frequently overlapping aboriginal use areas. In some areas, the overlapping aboriginal use areas are also overlapped with Hispanic land grants and traditional use areas of considerable antiquity. Because these use areas greatly exceed the boundaries of modern reservations and communities, many federal undertakings on federal, state, and private lands have the potential to affect traditional cultural properties. In some cases, the situation is complicated even on Indian lands because the tribe that currently owns the land is unrelated to or even a traditional enemy of tribes that ascribe traditional value to properties now under the jurisdiction of the land-owning tribe.

In order to ensure that traditional cultural properties are taken into account along with other historic properties potentially affected by federal undertakings, traditional communities with historic ties to sites within the area of potential effect must be identified and consulted. The problem, of course, lies in determining which communities have historic ties to which areas so that the agency will neither fail to consult potentially concerned communities nor place the burden of unnecessary consultations upon communities who have no concerns.

Among the Indian tribes having traditional cultural property concerns in New Mexico, very few have established means by which to respond to requests for consultation. Even for those who do, consultations about each of the thousands of federal undertakings every year would constitute an unbearable and unnecessary burden. In the State Historic Preservation Division we are working to establish procedures that will trigger consultations only when they are necessary, creating a manageable process for both the federal agencies and the traditional communities.

Beginning with Native American traditional communities, we are funding an ethnohistorical study to identify and develop base maps of traditional and aboriginal use areas beyond the boundaries of each tribe’s current reservation. When this study is completed, we will begin a series of consultations with the tribes to refine and add to the information on the maps. The tribes will be able to add or delete areas and increase or decrease the boundaries of areas shown on the maps. The important thing to stress here, however, is that these maps will not serve as a **substitute** for consultation about federal undertakings; they

will serve as a **trigger** for such consultation. In addition to establishing the geographic areas about which particular tribes wish to be consulted, we plan to initiate discussions about classes of undertakings, kinds of landforms, and other categories of activities and places that are of particular concern to the tribe or of generally little concern to the tribe. For example, sand and gravel operations might be of little concern to a tribe if they are confined to arroyo bottoms but of great concern if they involve isolated buttes or other prominent landscape features. A tribe might decide that well pads for oil and gas drilling in a particular area would require no additional consultation provided that archeological sites could be avoided. Prescribed burns might be of no concern in an area where there was no history of plant collecting but of great concern in an area where there was a long tradition of plant collection.

Ultimately, what we plan to do is to develop a GIS database that includes the mapped geographical areas about which tribes wish to be consulted and as much information as possible about when and how each tribe wishes to be consulted. When a federal agency determines that it has an undertaking requiring Section 106 consultations, it will be able to call up this database, input the UTM coordinates of the area of potential effect for the undertaking, and receive information about what tribes, if any, have asked to be consulted about this area as well as any available information about particularly sensitive landforms or types of undertakings, etc.

We also plan, with the consent of the tribes, to include information on known traditional cultural properties in this database. The information will be limited to location, eligibility to the National Register (if determined), identification of the tribe or tribes who ascribe traditional value to the property, and possibly a very general statement about the nature of the property. Access to this information would be restricted just as access to our archeological site data is restricted now.

When an agency queries the database about traditional communities to be consulted for an undertaking, it will also receive information about known traditional cultural properties within and near the area of potential effect for the undertaking along with information on which tribe or tribes to contact concerning the property. We will maintain files containing at least summary information about all traditional cultural properties identified through Section 106 consultations; more detailed, religiously sensitive information will be retained by the tribes.

Access to our files will be decided in consultation with the affected tribes. Some properties are not particularly sensitive and access to the information could be available to researchers as well as to federal agencies planning undertakings. For very sensitive properties information would be much more restricted, requiring case-by-case consent of the tribe prior to any access. The recent amendment to Section 304 of NHPA gives both federal agencies and SHPOs, in consultation with the Secretary of the Interior, much more discretion to maintain the confidentiality of information concerning the nature as well as the location of historic properties when disclosure of that information would increase the risk of harm to the property or impede use of a traditional religious site.

Using the information from our traditional cultural property database, the federal agency will be responsible for completing a good faith effort to identify traditional

cultural properties within the area of potential effect for the undertaking. We will be encouraging agencies to deal with this issue programmatically rather than on a case-by-case basis, to develop prior agreements with tribes about how these consultations will be handled.

Yet another “when to ask” issue that is causing controversy in New Mexico right now concerns identification of traditional cultural properties through field survey by Native American elders or religious use. This differs from field visits to known sites or general localities of known importance; this is commonly done as part of the traditional cultural property identification process. The controversial issue involves field visits to localities for which there is no oral history to indicate that historic properties are present.

The position of New Mexico SHPO has been that the whole point about traditional cultural properties is that information about these sites is preserved in the oral traditions of a living community. Furthermore, the eligibility of these sites to the National Register is based on their association with the cultural practices and beliefs of a living community that are rooted in that community’s history and are important in maintaining the continuing cultural identity of the community. Our position has been that if there are no practices involving a place, no beliefs concerning that place, and no mention of the place in the oral history of the community, it is not a traditional cultural property. The oral history component is essential. If there is no history of use of a place, no hint that it exists in the oral traditions of a community, then it is difficult to argue that preservation of this place is integral to maintaining the continuing cultural identity of the community. An alternate view on this issue is presented in the paper by Othole and Anyon below.

Recording

In order for federal agencies and SHPOs to make decisions about eligibility of and effect on traditional cultural properties and in order for federal agencies to appropriately manage such properties under their jurisdiction, those carrying out identification of these properties need to collect and record certain kinds of information. In New Mexico we haven’t designed or adopted any sort of standardized recording form, largely because we don’t feel that we understand the range of variability in traditional cultural properties well enough to do so yet. We have developed a draft set of guidelines for traditional cultural property recording, however, and we consider the following to be critical classes of information.

There should be a physical description of the property. As Bulletin 38 points out, traditional cultural properties must be tangible, they must have a fixed physical referent. We require a map location with boundaries that are clearly indicated and with information about how and why the boundaries were defined. It is virtually impossible to protect a property in a land-management situation without some kind of boundary definition. There should also be a physical description of the property including artifactual remains and any man-made or natural landscape features.

The site records should include references for any published sources describing this property or establishing the historic context of the property. For previously identified traditional cultural properties, this information is often

sufficient for determinations of eligibility and may spare community members the necessity of revealing information that they would prefer to keep confidential.

The records for the property must include information about the time depth of use for the property and about its integrity. They must also discuss the ways in which this property meets one or more of the criteria of National Register eligibility found in 36 CFR 60.4 and must provide sufficient contextual information to permit a determination of eligibility. There must be a direct and necessary association between the event, practice, individual, etc., and the physical location of the property. Additionally, in conformance with Bulletin 38, we require information establishing that the property is of importance to a community, not just to an individual or family.

In my experience, we often get far more information than we need for an eligibility determination, but this is good news for the traditional community. We keep reminding consultants and the communities that it is the historic qualities of the site that are of concern in the Section 106 process, not its sacred qualities. And although this is considered a nonsensical dichotomy by many traditional people, it has the advantage of limiting or largely eliminating the need for disclosure of sensitive information.

I always encourage ethnographic consultants to keep in mind the fairly limited information that is needed to determine eligibility. I need to know about a property’s association with a historic personage, with historic events, etc. I don’t need to know, and don’t wish to know, about the layers of confidential, sensitive, sacred knowledge associated with this historic property. Generally this information isn’t germane to or needed for the determination of eligibility, and its confidentiality can best be assured if it isn’t revealed in the first place. If for some reason some part of this information does prove necessary to the eligibility determination, it can be revealed later as needed.

Finally, because the identification process for traditional cultural properties is unique in relying on oral testimony, we ask that consultants include information about the age and special qualifications of those being interviewed and, if possible, their names as well. Notation of any corroborating physical or archival evidence is also very desirable. Various special circumstances may also lend additional weight to oral testimony.

The Hopi, for example, make a distinction between *Navoti*, which is an oral narrative based on historical knowledge of events which the speaker has experienced personally or knowledge that has been entrusted to the speaker as a member of a religious society, and *Tuuwutsi*, which is an oral narrative based on stories that the speaker has been told second hand and in a more secular context. Thus, we are inclined to give extra weight to information from a Hopi consultant that he or she classifies as *Navoti*.

Eligibility

As much as possible we are trying to treat traditional cultural properties just like other kinds of historic properties when it comes to determinations of eligibility. The

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use of the property must date back at least 50 years unless it is a truly unique or outstanding property; it must have integrity; and it must meet one or more of the criteria of eligibility.

One important consideration for consultants who are collecting traditional cultural property information: You need to provide those of us who have to make decisions about eligibility with sufficient information to place a property in a larger historic context. In order for us to evaluate these sites we need to understand where they fit into both the written history and the traditional history of the community.

In addition to these basic issues in determinations of eligibility, we also keep in mind the guidance in Bulletin 38 that says a traditional cultural property is eligible because of its association with the cultural practices or beliefs of a living community and because it is important in maintaining the continuing cultural identity of the community. For this reason we look for documentation that the site in question is of concern to a community, not just to one or a few individuals (although the definition of community in this context is pretty tricky), and we also look for evidence that the property is associated with practices that are ongoing in the community or could be re-instituted if the property can be preserved. Even in traditional communities, traditional practices die out and are no longer important in maintaining the continuing cultural identity of the community. We believe that preservation efforts for traditional cultural properties should be focused on those properties that are or could again become part of the cultural repertoire of a living community.

Effect and Mitigation

As with eligibility, we are trying to keep consultations about effect and mitigation for traditional cultural properties as much like those for other types of historic properties as possible. As defined in 36 CFR 800.9, effect is an alteration of those characteristics of a property that qualify it for inclusion in the National Register. Adverse effects are those that diminish a property's integrity through destruction, damage, or alteration; through isolation from or alteration of the property's setting; through introduction of audible, visual, or atmospheric intrusions; through neglect resulting in deterioration or destruction; and through lease, sale, or transfer of the property.

Because of the necessary association between traditional cultural properties and traditional cultural practices or beliefs, determinations of effect must also take into consideration any effects of the undertaking on the community's ability to continue using the property in culturally appropriate ways. Likewise, mitigation or treatment programs for undertakings should treat or mitigate effects on those qualities that qualify the site for inclusion on the National Register while taking into account the culturally specified requirements for continued, appropriate use of the property.

Final Thoughts

Trying to protect traditional cultural properties through Section 106 is a challenging but rewarding process. So far I have focused on ideas for meeting some of the challenges,

and there are challenges. The fit between traditional cultural properties and Section 106 is inexact at best, and the fit between the Section 106 process and the preservation needs of traditional communities is often worse. This is a new line of inquiry for most federal managers, for most archeologists, and for most traditional communities, and we are just starting to work the bugs out of the process.

But the rewards are also great, and I would like to close with a few words about those rewards. For all its failings and drawbacks, the Section 106 process is a real functioning process, backed up by law and by implementing regulations. In one form or another this process is operating in most federal agencies in every state and trust territory. For the great majority of federal undertakings that have the potential to affect historic properties, those effects get at least some consideration because of Section 106. For all the frustration that we sometimes feel over a law that requires no more than that the federal agency "take into account" those effects, the widespread applicability of Section 106 provides us with a very powerful opportunity to make a difference.

Every time that we work successfully with a traditional community to have their traditional cultural properties considered in the 106 process we offer those properties a possibility of protection that they have not had before. The longer that one works with traditional communities and the more one comes to realize the degree to which these communities cherish their historic properties, the greater the rewards.

The inclusion of traditional cultural properties in the Section 106 process is an issue that seems to give rise to strong feelings and sincere questioning among all the participants. I once had a devoted preservation professional tell me that he objected to inclusion of traditional cultural properties in this process because of the high requirement for keeping information confidential. He said that our mandate as public officials was to serve the public interest and that he could not see how a public process could be conducted in secret for the benefit of a few. He asked me, "What is the public interest that we are serving by doing this?"

My answer to him is the thought with which I would like to close this paper. As an anthropologist I believe that we can best serve the public interest by doing what we can to preserve cultural diversity in much the same way that biologists attempt to serve the public interest by preserving species diversity. The contribution that we can make through the Section 106 process is in preserving places that are integral to the customs, beliefs, and practices of traditional communities. When such communities lose access to or appropriate use of those places, they begin to lose the customs, beliefs, and practices that contribute to their cultural uniqueness. Every time one of the traditional cultures in this country dies out or loses more of its integrity, we all are poorer for that death or that loss. And that is where I would say that the public interest lies in our efforts to preserve traditional cultural properties through the Section 106 process.